MAR 23 PAGE 14

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-6413 A-755

CHRISTOPHER A. BURGER,

Petitioner,

v.

WALTER ZANT, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent.

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RESPONSE IN OPPOSITION TO PETITIONER'S
REQUEST FOR A STAY OF EXECUTION
PENDING DISPOSITION OF PETITIONER'S
PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1.

Should Petitioner's request for the issuance of an order staying his presently scheduled execution, which request is based solely on the pendency of his petition for a writ of certiorari, be denied?

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PART ONE

STATEMENT OF THE CASE

The Petitioner was convicted of murder in the Superior Court of Wayne County, Georgia on January 25, 1978. A sentence of death was imposed. On direct appeal to the Supreme Court of Georgia the Petitioner's conviction was affirmed; however, the Petitioner's sentence of death was vacated and a new trial was ordered as to punishment at Burger v. State, 242 Ga. 28, 247 S.E.2d 834 (1978).

The Petitioner was subsequently retried on the issue of punishment and on July 19, 1979 the Petitioner was again sentenced to death. On direct appeal from the reimposition of the death penalty the Supreme Court of Georgia affirmed the Petitioner's sentence at Burger v. State, 245 Ga. 458, 265 S.E.2d 796, cert. denied, 448 U.S. 913 (1980).

State habeas corpus relief was denied on October 1, 1980 by the state habeas corpus court, which denial of relief was

CERTIFICATE OF SERVICE

I, William B. Hill Jr., attorney of record for the Respondent and a member of the bar of the Supreme Court of the United States certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Response in Opposition to Petitioner's Request for a Stay of Execution Pending Disposition of Petitioner's Petition for a Writ of Certiorari upon the Petitioner's attorney, by depositing a copy the same in the United States Mail with proper address and adequate postage to:

Joseph M. Nursey
Millard C. Farmer
P. O. Box 1978
Atlanta, Georgia 30301

This 20th day of March, 1984.

WILLIAM B. HILL, JR.
Senior Assistant
Attorney General

affirmed by the Supreme Court of Georgia on that same date. From the denial of habeas corpus relief in the state courts, on October 2, 1980 the Petitioner filed an application for habeas corpus relief in the United States District Court for the Southern District of Georgia, Brunswick Division.

After conducting an extensive evidentiary hearing on March 4, 1981 the district court, on April 29, 1981 rendered its Order and Judgment granting the Petitioner habeas corpus relief in the form of an Order vacating Petitioner's sentence of death. The district court afforded habeas corpus relief in this regard based solely upon the circuit court's decision in Stephens v. Zant, 631 F.2d 397, modified on panel rehearing, 648 F.2d 446 (5th Cir. 1981).[1] The district court denied Petitioner's request for habeas corpus relief on all other allegations contained in his petition.

On May 11, 1981 the Respondent filed his notice of appeal from the district's granting of habeas corpus relief in the form of an Order vacating Petitioner's sentence of death. Petitioner filed a timely cross-appeal from that portion of the district court's Order denying habeas corpus relief on all other allegations contained in the petition.

On October 13, 1983, after extensive briefing and oral argument, the United States Court of Appeals for the Eleventh

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[1]On Argument before the United States Court of Appeals for the Eleventh Circuit, counsel for the parties agreed that this Court's then pending decision in Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) would control dispostion of the sole basis upon which habeas corpus relief was afforded by the district court. As is revealed by an examination of the circuit court's opinion below at Burger v. Zant, 718 F.2d 979, 982 (11th Cir. 1983), in light of this Court's opinion in Zant v. Stephens, supra, the district court's grant of habeas corpus relief was reversed.

Circuit rendered its opinion reversing the district court's granting of habeas corpus relief. Burger v. Zant, 718 F.2d 979 (11th Cir. 1983).

On February 13, 1984, Petitioner's petition for rehearing and suggestion for rehearing en banc was denied. On February 27, 1984 the circuit court denied Petitioner's request to stay the mandate pending filing of an application for a writ of certiorari in this Court. On March 6, 1984, upon receipt of the mandate of the circuit court, the district court entered its Order making the judgment of the United States Court of Appeals for the Eleventh Circuit the judgment of the district court. From the denial of habeas corpus relief Petitioner has pursued an application for a writ of certiorari, which application was docketed in this Court on March 14, 1984.

By Order dated March 15, 1984, the trial court scheduled Petitioner's execution for March 27, 1984. In response thereto, Petitioner has filed the instant request for the issuance of an Order by this Court staying his presently scheduled execution. Respondent vigorously opposes Petitioner's request..

STATEMENT OF FACTS

As noted by the Supreme Court of Georgia on the appeal taken by the Petitioner following his retrial on sentencing and the reimposition of a sentence of death, "[t]he facts surrounding the death of the victim, Roger Honeycutt, are amply set out in Burger v. State, supra and its companion case, Stephens v. State, 242 Ga. 34 (247 S.E.2d 838)(1978) and will not be repeated here." Burger v. State, 245 Ga. 458, 265 S.E.2d 796, cert. denied, 448 U.S. 913 (1980). Because the facts underlying Petitioner's reimposed sentence of death are the same as those adduced on his trial of January 23 and 24, 1978 which resulted in his conviction and original sentence of death, the transcript references in the following statement of facts are to the transcript of the original trial of January 23 through 24, 1978.

James Botsford, an army tank driver stationed at Fort Stewart, Georgia, had known Petitioner and co-indictee Thomas D. Stevens in Army Basic Training. (T. 85-88). Arriving at the Savannah Airport on September 4, 1977, Botsford telephoned the army base to ask about getting a ride from the airport to Fort Stewart. (T. 88-89). He spoke to Petitioner who told him that he and Stevens would pick him up at the airport. (T. 89). About two hours later Petitioner and Stevens arrived at the airport driving a taxicab. (T. 90). After Botsford got in, with Petitioner driving, he was told by Petitioner and Stevens that the cab was stolen. (T. 91, 95).

Stevens informed Botsford that he and Petitioner had forced the cab driver with a knife and knife sharpener to give them money, perform "unnatural acts" and then get into the car trunk. (T. 96). Although Stevens did most of the talking, Petitioner was agreeing with what was said. (T. 93). Stevens then called back to the trunk: "'Are you still there?'" Botsford heard a voice reply, "Yes sir." (T. 97). Stevens showed Botsford a knife and knife sharpener, which he put under the front seat. (T. 97).

During the ride back to Port Stewart, Stevens called back to the trunk several times asking the cab driver if he was there. (T. 103). Botsford always heard a voice answer. (T. 103). Stevens said that he had sexually assaulted the driver and that they should kill him and burn the car. (T. 100, 101). Botsford asked Petitioner and Stevens to free the driver and he told them that he would not tell the law if they would not kill the cab driver. (T. 100-104). Petitioner and Stevens both agreed to let the driver go. (T. 100, 104).

The following evening, Botsford was visited at Port Stewart by fellow soldiers Petitioner and Stevens who asked him if he had said anything. (T. 106). When Botsford told them he had not, they said they had freed the cab driver and ditched the car near Hinesville, Georgia. (T. 107). Prompted by a radio bulletin that he later heard regarding a missing cab driver, Botsford went to the State Patrol and the Army Criminal Investigation Department with the information he possessed. (T. 108-109).

An army investigation, John Berzenski, was notified on September 6, 1977 of a missing cab and driver. (T. 134). Berzenski and Clarence Haire, also an army investigator, found a boot on Highway 144 with the name of Roger Honeycutt inside. (T. 135, 136, 141). They found another boot, army socks, and a piece of yellow plastic approximately 200 yards within each other on Highway 144. (T. 137-138, 144-147).

Honeycutt, the missing cab driver, was an army private also stationed at Port Stewart, Georgia. (T. 121). He drove for the D&M Cab Company on nights and weekends. (T. 120-121).

Haire questioned members of Honeycutt's unit on September 9th in an attempt to locate Honeycutt. (T. 149). One of the men he questioned was Petitioner who told him that he had a friend who called the Shuman Cab Company about 10:00 p.m. on September 4th, but that they did not take the cab when it arrived at Port Stewart. (T. 149-150). A Shuman cab driver

testified that he did in fact get a call from Fort Stewart on September 4th, and in response thereto, he drove there accompanied by a friend. (T. 129-130). Two men asked him if he had change for $50.00, then left and did not return. (T. 130, 131). They had told him they were going to the airport. (T. 130). As the Shuman cab driver was leaving, the driver saw a D&M cab drive away from a nearby building at about 10:15 or 10:20 p.m. (T. 131).

A Jackson-Denno hearing was held outside the presence of the jury at trial to determine the voluntariness of the statement made to Investigatior Haire and Wayne County Detective F.J. Shuman. (T. 169-168). The trial court heard testimony from Haire, Detective Shuman and defense witness Dr. Joseph O'Haire, a clinical psychologist. Dr. O'Haire testified that Petitioner had a "mental deficiency" and a "psychopathic personality" that made him want to do wrong. (T. 248, 250). After hearing the testimony, the court ruled that the statements were voluntarily made. (T. 268).

The jury was returned to the courtroom and Investigator Haire testified that he interviewed the Petitioner on September 12th and advised Petitioner of the Miranda warnings. (T. 269-270). Petitioner stated that he did not want a lawyer and would answer any questions posed, after which Petitioner executed a waiver of rights form. (T. 272-273). At first, Petitioner denied any knowledge of Roger Honeycutt or Honeycutt's disappearance. (T. 276). When informed that there existed information that he had been in possession of the missing taxicab, Petitioner made a statement. (T. 278). Investigator Haire related the contents of Petitioner's statement to the court and to the jury. Petitioner stated that when he and Stevens ran out of money while drinking beer at the enlisted men's club, Stevens suggested robbing a taxicab driver. (T. 278-279). The two men summoned a Shuman Company cab, but decided not to take it when it arrived with two men

inside. (T. 279). Petitioner and Stevens then received a telephone call from Botsford, who was at the Savannah Airport, requesting a ride to Fort Stewart. Petitioner agreed to pick Botsford up at the airport. (T. 279).

Stevens and Petitioner next burglarized the dining facility where Stevens got a knife sharpener and Petitioner got a butcher knife. (T. 278). Thus armed, the two men telephoned and requested a D&M cab. (T. 280). When the cab arrived, Petitioner and Stevens asked the driver if he could change a $50.00 bill, and the driver said he could. (T. 280). Approximately fifteen miles away from the army base on Highway 144, as planned by a prearranged signal, Stevens placed the knife sharpener around the driver's neck while Petitioner put the butcher knife to the driver's ribs. (T. 280).

The driver was instructed to pull over and get out, and to give Petitioner and Stevens all of his money. When the driver gave Petitioner and Stevens only $16.00, the two asked the driver if he had more money, and when he stated that he did not, they forced the driver into the back seat of the taxi. (T. 281). Stevens then had the driver remove his boots and clothes which Stevens searched for money. (T. 281). With Petitioner driving, Stevens threw each item of the driver's clothing out of the window after it had been searched for more money. (T. 281). In addition to searching the driver and his clothing, Stevens and Petitioner also searched the automobile for money. (T. 281).

After robbing the driver and forcing him to disrobe, Stevens forced the victim to perform oral sodomy on him. (T. 282). Stevens then performed anal sodomy on the victim. (T. 282). Before they reached the airport, Petitioner and his cohort forced the bound driver into the trunk of the taxicab. (T. 282). Petitioner and Stevens then proceeded on to the Savannah Airport where they picked up their friend Botsford and bragged to him that they had stolen the taxicab and had the

bound driver secured in the trunk. (T. 283). Petitioner and Stevens, in order to convince Botsford of the truth of their story, called back to the driver, requiring that the driver respond. (T. 283). Stevens suggested that they kill the driver, but Botsford protested and asked them not to do so. (T. 284).

After dropping Botsford off at Fort Stewart, Georgia, Petitioner and Stevens drove on to Jesup, Georgia, where they careened up and down several dirt roads to make the car go "from side to side," forcing the victim to roll around in the truck. (T. 284). The two men then stopped at a convenience store where Stevens removed the taxicab's dome light and hid it in the bushes. (T. 284).

After noticing a patrol car following them for a short period of time, Petitioner and Stevens decided to get rid of the taxicab. (T. 285). The two men drove to a "borrow pit" where they had gone swimming several times in the past. Petitioner and Stevens were careful to wipe their fingerprints from every area of the taxicab. (T. 286). Afterwards, Petitioner raised the lid of the trunk and asked the victim if he was alright. The victim responded that he was, and Petitioner closed the lid of the trunk. (T. 346). Petitioner then started the automobile and drove it into the "borrow pit," jumping from it just before impact with the water. (T. 286, 289). Petitioner and Stevens waited at the scene of the murder, watching the taxicab as it slowly sunk beneath the surface of the water. (T. 286). Petitioner further stated to Investigator Haire that they had tied the victim's hands with cord cut from the taxicab's C.B. radio, and that they had thrown the radio into the bushes beside the "borrow pit." (T. 286). To Investigator Haire, Petitioner admitted that he and Stevens killed the taxicab driver to prevent him from identifying them later. (T. 287).

After completing his statement to Investigator Haire, Petitioner offered to show Haire where the borrow pit was located. (T. 89). Haire and two other men from the criminal investigation office, pursuant to Petitioner's directions, proceeded to the borrow pit. (T. 289). Shortly afterwards, Detective Mike Deal arrived at the borrow pit where the missing taxicab was ultimately recovered. (T. 152, 161). A knife and a knife sharpener were found on the right floorboard of the cab. (T. 157, 158). A body in the trunk of the car was subsequently identified as that of Roger Honeycutt. (T. 306, 308, 311). The victim's death was established as being caused by drowning. (T. 308).

Wayne County Detective P.J. Shuman testified at trial that he took Petitioner from Fort Stewart authorities to the Wayne County Jail on September 13, and advised Petitioner of the Miranda warning. (T. 319-320). Shuman and Petitioner went over Petitioner's statement to Haire word by word, and Petitioner affirmed to Shuman everything contained in the statement. (T. 322). Petitioner also added that he and a friend returned to the borrow pit to get the C.B. radio, and that the radio was in Petitioner's mother-in-law's automobile. (T. 323).

On September 14, Petitioner directed Wayne County authorities over the same route that he and Stevens had driven the stolen taxicab. (T. 325). The cab's dome sign was recovered from the bushes near a convenience store, and the yellow plastic found on Highway 144 was determined to have come from the taxicab's dome sign. (T. 326, 328, 329).

Further facts will be developed on this response as needed to further illuminate any issue raised herein.

PART TWO

ARGUMENT AND CITATION OF AUTHORITY

A. PETITIONER'S REQUEST FOR THE ISSUANCE OF AN ORDER STAYING HIS PRESENTLY SCHEDULED EXECUTION, WHICH REQUEST IS BASED SOLELY ON THE PENDENCY OF HIS PETITION FOR A WRIT OF CERTIORARI, SHOULD BE DENIED.

On this application for the issuance of an Order by this Court staying his presently scheduled March 27, 1984 execution, Petitioner relies upon the pendency of his petition for a writ of certiorari filed in this Court as the sole basis for the granting of the requested Order. In Barefoot v. Estelle, __ U.S.___, 103 S.Ct. 3383 (1983) this Court established benchmarks to be utilized by counsel involved in capital litigation. With specific reference to requests for stays of executions, in Barefoot, supra at 3395 this Court stated the following:

> Stays of execution are not automatic pending the filing and consideration of a petition for a writ of certiorari from this Court to the Court of Appeals that has denied a writ of habeas corpus. It is well-established that there "'must be a reasonable probability that four members of the Court would consider the underlying issues sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision, and there must be a likelihood that irreparable harm will result if that decision is not stayed.'" (cites omitted).

> Applications for stays of death sentences are expected to contain the information and materials necessary to make a careful assessment of the merits of the issue and so reliably to determine whether plenary review and a stay are warranted. A stay of execution should first be sought from the Court of Appeals, and this Court generally places considerable weight on the decision reached by the circuit courts in these circumstances.

Id. at 3395.

In the instant case, after denying Petitioner's petition for rehearing and suggestion for rehearing en banc on February 13, 1984, the circuit court denied Petitioner's request to stay the mandate in an Order dated February 27, 1984. It is obvious to this Respondent that the United States Court of Appeals for the Eleventh Circuit is well aware that its refusal to stay the mandate, pending Petitioner's filing of an application for a writ of certiorari in this Court, was tanamount to the denial to Petitioner of a stay of execution pending the filing and disposition of a petition for a writ of certiorari in this Court. Accordingly, this Court should afford "considerable weight" to the decision of the circuit court.

In Barefoot, supra at 3391, this Court noted that direct appeal is the primary avenue for review of a conviction or sentence, with capital cases being no exception. "When the process of direct review -- which, if a federal question is involved, involves the right to petition this Court for a writ of certiorari -- comes to an end, a presumption of finality and legality attaches to the conviction and sentence." Id. at 3391.

Having identified the primary avenue for review of convictions and sentences, this Court noted that the role of federal habeas corpus proceedings, while important in assuring

that constitutional rights are observed, is secondary and limited in nature. "Federal courts are not forums in which to relitigate state trials. Even less is federal habeas a means by which a defendant is entitled to delay an execution indefinitely." Id. at 3391. With specific reference to the inherent nature of capital litigation, this Court noted that:

> It is natural that counsel for the condemned in a capital case should lay hold of every ground which, in their judgment, might tend to the advantage of their client, but the administration of justice ought not to be interfered with on mere pretexts. (cite omitted).

Id. at 3391.

In this regard, on an application for a stay of execution pending disposition of a petition for a writ of certiorari, as in the instant case, this Court specifically stated that stays of executions are not automatic and on such an application the burden rests upon the petitioner to demonstrate that (1) there exists a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorous for the grant of certiorari or the notation of probable jurisdiction, (2) there must be a significant possibility of reversal of the lower court's decision and (3) there must be a likelihood that irreparable harm will result if the lower court's decision is not stayed. Barefoot, supra at 3395.

In the instant case Petitioner merely incorporates in support of his request for a stay of execution, those arguments made in his petition for a writ of certiorari docketed in this Court on March 14, 1984. On March 19, 1984, via express mail, Respondent mailed for filing his response in opposition to Petitioner's petition for a writ of certiorari. An examination of Respondent's response in opposition, which Response is

incorporated as if fully set forth herein, reveals that all of Petitioner's issues presented to this Court for review are totally without factual support in the record, and without legal merit. Of considerable import is the fact that the circuit court, which court reversed the district court's grant of habeas corpus relief, denied Petitioner's petition for rehearing and suggestion for rehearing en banc, and denied Petitioner's request for a stay of the mandate pending filing and disposition of a petition for a writ of certiorari in this Court. After a careful and thorough legal analysis the circuit court, at Burger v. Zant, 718 F.2d 979 (11th Cir. 1983) determined that all of Petitioner's contentions were without factual support in the record and without legal merit.

In light of the exhaustive reviews afforded Petitioner by the state courts on direct appeal and in state habeas corpus proceedings and by the federal courts in federal habeas corpus proceedings, there exists no basis for the granting of Petitioner's petition for a writ of certiorari, and accordingly, no basis for the granting of the requested stay of execution. Therefore, Petitioner's request for a stay of his presently pending March 27, 1984 execution should be denied.

Alternatively, Respondent would request that this Court deny the petition for a writ of certiorari and deny the subject request for a stay of execution.

CONCLUSION

For all of the above and foregoing reasons, and for all of those reasons set forth in Respondent's Brief in Opposition to Petitioner's Petition for a Writ of Certiorari, this Court should deny the instant request for a stay of execution or denying the petition for a writ of certiorari and the subject request for a stay of execution.

Respectfully submitted,

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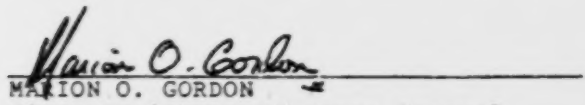

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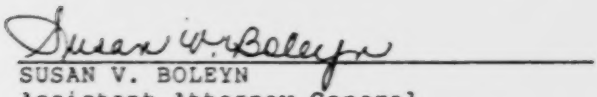

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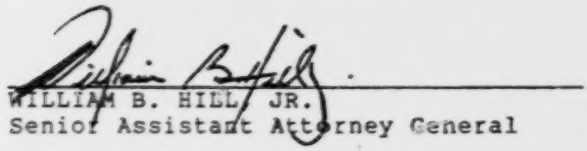

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